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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 514

CLARK E. FINKS and FRANCIS A. WILLETTE, JR.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, Clark E. Finks and Francis A. Willette, Jr., pray that a writ of certiorari issue to review the judgment of the United States Court of Claims which dismissed the petition below on June 14, 1968.

CITATIONS TO OPINION BELOW

The Opinion of the United States Court of Claims dismissing the petition is printed in appendix A hereto, page 9, and is reported in ___ Ct. Claims ___, ___ F.Supp. ___.

JURISDICTION

The United States Court of Claims entered judgment dismissing the plaintiffs' petition on June 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255 (1).

QUESTION PRESENTED

Did the seizure of petitioners' automobiles in Brazil by officials of the United States Agency for International Development, acting under the express and implied instructions of the U.S. Ambassador to Brazil, and the subsequent refusal to release the vehicles to petitioners and the subsequent surrender of the vehicles by U.S. officials to the Brazilian Government constitute a taking of petitioners' property for public use without just compensation in violation to the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioners filed suit in the United States Court of Claims seeking compensation for their vehicles which had been seized by U.S. officials in Brazil. A Petition was filed in the United States Court of Claims on March 1, 1965. Jurisdiction was based on 28 U.S.C. 1491. The case came before the Court on cross-motions for summary judgment, in that there was no genuine issue of material fact. The case was argued before the Court of Claims on April 30, 1968 and judgment was entered on June 14, 1968 which granted the government's motion for summary judgment, denied the petitioners' motion for summary judgment, and dismissed the petition.

The petitioners were employees of the United States Agency for International Development, being assigned to the USAID mission in Recife, Brazil, in November 1962. In accordance with the then existing custom of U.S. employees in foreign countries and in accordance with existing laws and regulations, the petitioners each ordered an automobile from the Foreign Distributors Division of the General Motors Corporation in New York. At the time of purchase, the petitioners executed a document entitled "Statement of Purchase for Export and Disposal in Foreign Country" in accordance with existing Internal Revenue Service regulations which permits exemption from the manufacturer's excise tax, provided that the vehicle will not be returned to the United States. The vehicles arrived in Brazil in September 1963.

On August 1, 1964, the petitioners were accused of assaulting a Brazilian national by name of Demetrio Antonio da Silva. The Brazilian had advanced the petitioners the sum of one thousand dollars each prior to ordering the vehicles from the United States. These funds were repaid by the petitioners; however, a dispute arose over da Silva's proprietary interest in the vehicles. Shortly thereafter, da Silva filed an ex parte petition in the Recife Court which resulted in the seizure and impoundment of the two automobiles. Both the alleged assault and the impoundment of the vehicles resulted in a great deal of publicity in the local press.[1]

The petitioners retained Brazilian counsel who contested the validity of the impoundment of the vehicles. A hearing was held in September 1964 and the vehicles were ordered released to the petitioners.

On October 22, 1964, both vehicles were released from custody by the Brazilian police and actual possession was restored to the petitioners. The petitioners then delivered the vehicles to a local garage for servicing and instructed the

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[1] Plaintiffs' Exhibit 6.

garage owner that they would pick up the vehicles on the following day.

At 6:00 p.m. on October 22, 1964, the plaintiffs were summoned to a meeting with their superiors. They were then informed that they should make arrangements to leave Brazil within the next two days and further, that the United States would take care of their vehicles. The following morning at 9:00 a.m. the petitioners submitted letters of resignation to become effective on November 22, 1964.

On October 23, 1964, at 10:00 a.m., plaintiffs' automobiles were seized and impounded by Mr. R.C. Santos, Executive Officer of the U.S. AID Mission in Recife, acting under the direction of Mr. Donor M. Lion, Director of the Special Northeast Program for Brazil at Recife and Associate Director of USAID Brazil, acting in his official capacity and as an agent of the United States Government. Mr. Lion took this action upon the express and implied instructions of the United States Embassy at Rio de Janeiro, Brazil, and the United States Ambassador to Brazil.[2]

Petitioners immediately thereafter demanded the return of their vehicles from the U.S. officials, said demands being refused. Subsequent oral and written demands were also refused.

On December 3, 1964, USAID officials informed the Brazilian Inspector General of Customs that the vehicles were being placed at the disposal of the Recife Customs Office. On December 14, 1964, the petitioners returned to the United States pursuant to official travel orders.

The principal facts relied upon established that on October 23, 1964, legal title and possession of the automobiles were vested in the petitioners; that on that date, U.S. officials, acting on the express and implied instructions of the United States Embassy in Brazil and upon the direct orders of the United States Ambassador to Brazil seized the vehicles and then, on December 3, 1964 placed the vehicles at the disposal of the Brazilian Government.

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[2]Defendant's Exhibit 14.

REASONS FOR GRANTING THE WRIT

I

Contemplated Sale of the Vehicles by Petitioners in Brazil Was No Justification for Seizure by the United States

Petitioners assert that the writ should be granted in that the basic ruling of the Court below follows its own decision in *Derecktor v. the United States*, 129 Ct. Cl. 103, 128 F. Supp. 136, (1954). In *Derecktor*, the plaintiff's petition was dismissed by the Court of Claims and the case was subsequently settled after the Supreme Court granted certiorari, 348 U.S. 926 (1955)[3]

The *Derecktor* case was relied upon by the defendant below. That case involved the sale of a ship by the government and the then refusal of the Maritime Commission to issue the necessary registration documents after the intervention by the Department of State. The factual situation with the instant case is analogous in that here the Department of State was attempting to prohibit the sale of automobiles in Brazil. Judge Whittaker commented in the dissent in *Derecktor* that ". . .I am not at all concerned with the propriety of the efforts of the State Department to prevent the use of an American vessel in this traffic. This is beside the issue . . ."[4]

The propriety of a contemplated sale of the petitioners' vehicles is not in issue in this case – or at most is "beside the issue". What is in issue is the possession of privately owned property, the historical sanctity of which was invaded by bureaucratic action.

The opinion by the Court of Claims indicates that its rationale was based entirely on whether or not the petitioners could legally sell their vehicles in Brazil, thereby effectively following their own opinion in *Derecktor, supra*, in violation of the Fifth Amendment.

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[3] Settlement details at 132 Ct. Cl. 112.

[4] 128 F.Supp at 142.

In the case of *Mitchell v. Harmony*, 13 Howard 115, 141 L.Ed. 75 (1851) this Court established that when a U.S. official seizes private property belonging to a U.S. citizen in a foreign country, the U.S. must make full compensation. In that case, the plaintiff lawfully took goods into Mexico. While en route, war was declared and his property was seized by a U.S. Army officer acting pursuant to orders.

In *Mitchell, supra* at p. 83, this Court cited the defense's reliance on "rumors . . . and suspicion . . . of a secret design . . . to carry on an illicit trade with the enemy injurious to the interest of the United States."

The Court went on to hold that ". . . mere suspicion of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen."

II

Acquisition of Title through Substantial Interference[5]

The Court of Claims ruled that the subject property was "not appropriated within the scope of the Fifth Amendment. . ."[6]

Petitioners assert that the uncontested facts in this case sustain that there was an effective taking, far beyond the minimal requirements of substantial interference. The Court below had previously ruled in *Societe Cotonniere Du Tonkin, supra,* that ". . .It is not necessary that there be a taking in the sense of one being deprived of legal title or physical possession. Substantial interference with the owner's use of the property is sufficient."

In the instant case, there was a physical seizure of the vehicles by U.S. officials, and shortly thereafter, these same U.S. officials placed the vehicles at the disposal of the Brazilian Government.

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[5]Societe Cotonniere Du Tonkin v. United States, 145 Ct. Cl. 426, 171 F.Supp. 951 (1959), *cert. denied,* 361 U.S. 965 (1960).

[6]See page 8 of the slip opinion, Appendix, page 16.

In *United States v. Dickinson*, 331 U.S. 745, 749, 91 L. Ed 1789 (1947) this Court ruled that:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure . . ."

Justice Holmes found a use or "servitude" in the firing of projectiles across land by the government in *Portsmouth Harbor L. & H. Co. v. United States*, 260 U.S. 327, 67 L. Ed 287, (1922).

A note in the Harvard Law Review commented on the *Caltex* case[7] and stated as follows:

> "The just compensation clause is an undertaking to redistribute certain private losses inflicted for the public benefit, so that they will not fall solely upon those whose property happens to be affected. *It is clear that the Government need not affirmatively use the property in the conventional sense, for the owner to be entitled to compensation."* (emphasis supplied.)[8]

III

The Constitutional Requirement of Public use does not require that the Government use the vehicles in the conventional sense.

The defendant and the opinion of the Court below both rely on the fact that the automobiles were not in fact "used" by the Government. This seems to imply that the U.S. officials would actually have to drive the cars on official business or otherwise use the vehicles in some commercial traffic.

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[7] Caltex (Philippines), Inc. v. United States, 129 Ct. Cl. 605, 122 F. Supp. 830 (1954), *cert. denied*, 348 U.S. 926 (1955).

[8] 64 Harv L. Rev. 693

The opinion of the Court of Claims states that "There was no indication that the government would make any use of the vehicles public or otherwise, at any time."[9]

Petitioners assert that the decision of the ranking U. S. official in Brazil that it would be in the best interest of the foreign policy of the United States to seize the vehicles satisfies the Fifth Amendment mandate of public use.

Petitioners urge that if there is an apparent benefit so determined by competent authority, which results in a seizure of the property, then the constitutional requirement of use has been met. The petitioners should not be placed in the position of arguing that there was in fact a public benefit to be gained by the seizure of their vehicles.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9]Slip opinion, page 9, Appendix, page 17.

In the United States Court of Claims

No. 65-65

(Decided June 14, 1968)

CLARK E. FINKS, AND FRANCIS ARTHUR WILLETTE, JR. v. THE UNITED STATES

J. Gordon Forester, Jr., attorney of record, for plaintiffs. *George M. Beasley, III*, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiffs, Clark E. Finks and Francis Arthur Willette, Jr., were employed by the United States Agency for Industrial Development (USAID) as Foreign Service Officers for a 2-year term which began on November 9, 1962 and November 16, 1962, respectively. They were stationed at Recife, Brazil.

Each had purchased a 1963 automobile from the Foreign Distributors Division of the General Motors Corporation. These vehicles could be imported into Brazil without payment of any Brazilian customs or duties under a diplomatic agreement between Brazil and the United States. That agreement provided for the waiver of Brazilian customs and duties for certain diplomatic personnel if requested by the United

States Embassy. The Embassy certified to the Ministry of Foreign Affairs that the plaintiffs qualified for duty-free importation and noted that Brazilian law precluded duty-free resale of their vehicles without prior authorization from the Ministry.

Plaintiffs claim that by impounding their vehicles the USAID took their property without just compensation in violation of the Fifth Amendment of the Constitution for which they are entitled to $12,000 each. That sum represents the market value of the automobiles in Brazil.

This case is before us on cross-motions for summary judgment. Each party agrees that there are no material facts in dispute. We find that there has not been a compensable "taking," and therefore we grant defendant's motion for summary judgment.

I.

When the vehicles were purchased in the United States, plaintiffs, to obtain an exemption from the manufacturer's excise tax imposed by the United States on the sale of automobiles, signed a document provided by the Internal Revenue Service titled "Statement of Purchase for Export and Disposal in Foreign Country." That document provides:

> In order to qualify for purchase without payment of Federal Excise Tax, I state herewith that this * * * automobile will be exported prior to use in the United States and will be resold or otherwise disposed of in a foreign country and will not be returned to the United States.[1]

To finance their purchases plaintiffs obtained $1,000 each from a Brazilian national named Demetrio Antonio da Silva. They have consistently maintained that this money was a loan, but da Silva, with equal obduracy, has claimed that the money was a down-payment on plaintiffs' agreement to sell

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[1] If the vehicles were returned to the United States plaintiffs might have violated the terms of their exemption from (and become liable for) the amount of excise taxes which would otherwise have been payable on the purchase of the vehicles. Defendant notes that plaintiff would probably have been exempted from the excise taxes imposed on imports to the United States. In any event, plaintiffs were not prohibited by their statements from returning the vehicles to the United States, as they argue, albeit returning them might create a tax liability.

him the automobiles after they became available for duty-free resale.

The vehicles were shipped from the United States and subsequently released from Recife Customs in October and November, 1963. Thereafter, they were used for plaintiffs' personal use.

During June and July of 1964, several Brazilian used car dealers offered to buy the automobiles. At about this time USAID officials realized that there had been an increase in the number of automobiles sold duty-free to Brazilians by diplomatic personnel who had imported the vehicles duty-free. To stop this evasion of Brazilian customs duties, the USAID notified all of its employees that they must terminate any then-existing agreements wherein a Brazilian had furnished all or part of the cost of a vehicle imported duty-free in return for a promise that the vehicle would be sold to him when it became eligible for resale. Plaintiffs, specifically, were told to repay da Silva the $2,000 that had been "loaned" to them.

We note that this problem of duty-free resale existed long before plaintiffs arrived in Brazil. In November 1962, Finks and Willette signed a June 19, 1962 memorandum from the USAID "certifying that * * * [they] received, read and understood" the necessity for complying with Embassy Instruction No. 103. (Defendant's exhibits No. 7 and No. 8.) That Instruction explains the procedure for disposition of a duty-free automobile and includes the statement: "under no circumstances may it [an eligible vehicle] be turned over to any buyer until and unless the Brazilian Government has issued the sales authorization document nor may any sales transaction be consummated prior to that time." In addition, it continues: "The sale of any vehicle is not authorized, even if approved by the Embassy, until customs officials have issued the required authority to the Municipal and State Officials."

Plaintiffs have offered no evidence which contradicts their knowledge of these procedures. The Instructions contain a provision which is applicable to plantiffs. It reads: "Persons who resign and remain in Brazil * * * shall be required to pay duty on the vehicles if the resignation occurs when the vehicle has been in the country less than two years. The Bra-

zilian Government will not assess duty, however, if the vehicle is exported, or if sold to a person who had duty-free privileges, * * *. * * * Vehicles that have been in the country less than two years, but more than one year, may be sold to anyone, *if the owner is eligible under these regulations and is transferred permanently from Brazil.*" [Emphasis supplied.] Plaintiffs vehicles cleared Recife customs in October and November of 1963, and plaintiffs were in the process of accomplishing a sale in November of 1964 (approximately one year later) when they tendered their resignations. Plaintiffs knew that their sales were subject to the approval of both the Embassy and the Ministry as explained in the Instructions given to them on their arrival in Brazil.

On August 1, 1964, plaintiffs, da Silva and his attorney, met in da Silva's apartment at his request. The following day, da Silva accused plaintiffs of breaking into his apartment, destroying certain documents which provide his ownership of the automobiles, and assault. On the same day, he accused plaintiffs of an attempted swindle and filed criminal charges. The record does not indicate if these charges were ever sustained in subsequent legal proceedings.

On August 20, da Silva filed a petition in the local Recife court asserting his claim of ownership and asking the court to seize the vehicles. A preliminary writ was issued, and on August 22 the vehicles were impounded by the Brazilian police.

On August 26, before any decision was reached in the seizure case, da Silva filed another petition in which he requested specific performance of his alleged contract (a comminatory action under Brazilian law).

After a full hearing on September 29 the original seizure writ was revoked, and the judge directed the police to return the vehicles to plaintiffs. He found that da Silva had been unable to offer sufficient evidence to establish ownership and noted that customs duties would have to be paid if a sale occurred. The papers submitted in the seizure action were attached to the comminatory petition.

Two USAID officials met with plaintiffs, and together they agreed that the vehicles, when released pursuant to the September 29 order, should be sent to Rio de Janeiro for

safekeeping from possible harm by da Silva. On October 22 the vehicles were released to plaintiffs and an official from USAID. The automobiles were delivered to a local garage for servicing, and the attendant was told that plaintiffs and the USAID man would return the next afternoon. That evening, however, plaintiffs were ordered by the USAID to leave Brazil within two days and to return to the United States. The USAID agreed to dispose of the vehicles as plaintiffs would instruct. The following morning, plaintiffs submitted their resignations, effective November 22, 1964. They then proceeded to the garage and asked that the vehicles be ready for them at 11 o'clock that morning. The attendant notified the USAID of plaintiffs' request, and pursuant to Embassy instructions, USAID officials impounded the vehicles pending clarification of plaintiffs' intentions. It is this act which plaintiffs contend was a taking of their property, compensable under the Fifth Amendment. The facts surrounding, and following, the impounding procedure color the USAID's action and reveal that, in no manner was this a constitutional "taking" of private property for a "public use".

Plaintiffs had openly and continuously declared that they intended to sell the vehicles, flouting the Embassy directive prohibiting this procedure and threatening to violate Brazilian customs law. The Embassy, in its attempt to stop any sale which would violate treaty agreements and Brazilian law, ordered the vehicles held. At all relevant times the vehicles remained subject to plaintiffs' disposition. Their rights of ownership were limited to the extent that the USAID would not permit a disposition in violation of Brazilian law, a limitation imposed upon all similarly situated owners of duty-free automobiles. (In the absence of appropriate authorization for the duty-free resale—which had not been obtained—a sale by plaintiffs would violate Brazilian law if they refused to pay duties.) Admittedly, the USAID temporarily deprived plaintiffs of their possession, but only for the limited stated purpose of controlling the ultimate disposition of the vehicles, as finally determined by plaintiffs.

Several demands for return of the vehicles followed. All were denied because plaintiffs refused to agree that the vehicles would not be sold "duty-free," *i.e.*, without payment of duties.

On November 25, the United States Ambassador, Lincoln Gordon, offered plaintiffs three choices. They could either pay the customs duties and sell the vehicles in Brazil; they could have the vehicles returned to the United States (at government expense); or they could permit the automobiles to rust in storage. (No mention was made of the then-pending specific performance litigation between da Silva and plaintiffs.) All of these suggestions were refused, and plaintiffs reasserted their claim that they could dispose of the vehicles as they wanted, as a matter of right, and that this right was not subject to the control of either the USAID or the Embassy, or even the President of the United States.

On November 23, plaintiffs were told that the Embassy would not request permission from the Brazilian authorities for a duty-free sale of their automobiles. That authorization is *the* essential prerequisite before vehicles, imported duty-free, may legally be sold duty-free. Plaintiffs have admitted: "all that was lacking was the administrative approval of the United States officials." The absence of Embassy approval and a request from the Embassy to the Ministry (which results in the appropriate authorization) is an insurmountable barrier to a legal duty-free sale.

Plaintiffs did not leave Brazil until December 14. On December 3, USAID officials notified the Inspector General of Customs that the vehicles were "at the disposal of the Recife Customs office until such time as the situation with respect to the cars is cleared up in accordance with the wishes of their owners, that is as to whether the respective duties and taxes are to be paid or whether the cars are to be re-exported from Brazil." The Recife office asked the USAID to continue to store the vehicles at its warehouse. In February 1965, plaintiffs wrote to the USAID, repeating their intentions not to ship the automobiles to the United States. They never agreed to pay customs duties.

On September 16, 1965, almost one year after the vehicles were impounded, a hearing was held on da Silva's specific performance action. Plaintiffs were represented by Brazilian counsel. On September 29, the court declared da Silva owner of the vehicles. On October 8, the Recife Customs office asked the USAID to transfer the vehicles to its

warehouse because final disposition of the specific performance litigation would affect customs and duty payments.

Plaintiffs' Brazilian attorney filed an appeal from the adverse decision of the lower court. On November 12, however, he filed a motion to vacate the appeal because he had been instructed by plaintiffs not to continue. The Recife Customs office filed a third-party petition in the appeal proceeding requesting payment of customs duties from whomever the court declared owner of the vehicles. On April 13, 1967, the Customs office withdrew its petition in response to da Silva's payment of the customs duties. The vehicles were given to da Silva pursuant to the lower court's order.

II.

Before we analyze the applicability of the Fifth Amendment to these facts, we find it necessary to explain, briefly, the procedures which permit importation duty-free and resale duty-free of an American automobile by diplomatic personnel. A Bureau of Customs (Brazil) Circular (placed in evidence by both parties) details the procedures which the American Embassy is obliged to follow. If the requisite conditions are met and the procedures followed, the Ministry of Foreign Affairs may permit a duty-free resale.

A vehicle becomes eligible for duty-free resale if two years have elapsed since the vehicle cleared Brazilian customs, or if an owner is transferred out of Brazil and the vehicle has been in the country more than one year. The Embassy Instructions previously referred to explain that persons who resign and permanently depart from Brazil may be permitted to sell their vehicles if the vehicles have been in Brazil more than a year. (Plaintiffs assert that they are within this provision.) If the vehicles have been in Brazil less than a year resale, duty-free, is possible only if the sale is to a person who, himself, might have imported a vehicle duty-free. Persons who resign but remain in Brazil must pay duties on any vehicle in the country less than two years.

These conditions do not limit a right of resale; nor do they invalidate a resale. They merely prescribe the conditions under which a *duty-free* resale might be accomplished.

Diplomatic personnel do not have a *right* to sell their vehicles duty-free, even if these conditions are fulfilled. Compliance with these time requirements will make a vehicle eligible for duty-free resale. Authorization for the sale is necessary before a resale qualifies. To obtain authorization, the Embassy must request permission from the Ministry. Both the Embassy and the Ministry might refuse to act. If this should occur, as in this case when the Embassy refused to request authorization, a sale might be completed, but not without payment of the duties which had been waived at importation. We note, again, that plaintiffs admit that this authorization was never obtained, and that they never made known any intention other than disposing of the vehicles by an unauthorized duty-free sale (*i.e.*, a sale without payment of any duties). A sale, without an authorization, effectively revokes any prior waiver of duties.

III.

The Fifth Amendment provides: "nor shall private property be taken for public use without just compensation." We are compelled, initially, to determine if there has been an appropriation, or seizure of property which constitutes a "taking". *Cuban Truck & Equipment Co.* v. *United States*, 166 Ct. Cl. 381, 333 F. 2d 873 (1964), *cert. denied*, 382 U.S. 844 (1965). We find that plaintiffs' property was not appropriated within the scope of the Fifth Amendment, nor was it devoted to a "public use".

In *Societe Cotonniere Du Tonkin* v. *United States*, 145 Ct. Cl. 426, 171 F. Supp. 951 (1959), *cert. denied*, 361 U.S. 965 (1960), we discussed the nature of a compensable taking. We said:

> The elements necessary to prove a compensable "taking" are well-defined. *It must first be shown that there was an effective "taking" of the property by the Government.* It is not necessary that there be a "taking" in the sense of one being deprived of legal title or physical possession. *Substantial* interference with the owner's use of the property is sufficient. [Citations omitted and emphasis supplied. 145 Ct. Cl. at 441, 171 F. Supp at 959.]

Our only concern in this case is with the nature of an appropriation, exercise of control, or a seizure which con-

stitutes either a "taking" or a "substantial" interference with proprietary rights. In *United States* v. *Dickinson*, 331 U.S. 745 (1947), the Court defined a constitutional taking:

> Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. [331 U.S. at 748.]

Again, in *Franco-Italian Packing Co.* v. *United States*, 130 Ct. Cl. 736, 128 F. Supp. 408 (1955), we found that "a compensable exercise of the eminent domain power, [occurs when] a property interest is taken from the owner and applied to the public use because the use of such property is beneficial to the public * * *." [130 Ct. Cl. at 745–746, 128 F. Supp. at 414.]

It is clear that not every deprivation of use, possession, or control is a "taking". It is the character and extent of an invasion of property rights which are determinative. *United States* v. *Causby*, 328 U.S. 256, 266 (1946). It is equally clear that not all takings of property are compensable. *See e.g.*, *Houck* v. *Little River Drainage District*, 239 U.S. 254 (1915); *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49 (1932). Nor is an interference with the use of property a compensable taking if it is the result of a sovereign act. *See e.g.*, *New Orleans Public Service, Inc.* v. *City of New Orleans*, 281 U.S. 682 (1930); *United States* v. *Carver*, 278 U.S. 294 (1929).

We need not pursue this inquiry beyond the basic question posed, *i.e.*, was there an appropriation. The record conclusively proves that there was not. The vehicles were impounded and plaintiffs were deprived of their possession. That deprivation, however, was temporary in nature. The government repeatedly offered to return the vehicles if plaintiffs would agree not to violate Brazilian law. The vehicles remained within plaintiffs' control. On several occasions the government took pains to repeat its statement that the vehicles would be disposed of according to plaintiffs' directions. If plaintiffs failed to decide what was to be done with the vehicles they were to remain in storage. There was no indication that the government would make any use of the vehicles, public or otherwise, at any time.

Plaintiffs knew that the vehicles were being held only to prevent an illegal disposition, and that they would be returned if plaintiffs chose some method of disposal other than the one which had been proscribed. At most, the government restricted plaintiffs' absolute right to dispose of their property, even if that disposal violated treaty agreements and Brazilian law. This restriction and the impounding procedure undertaken to enforce it are not a "taking". Nor are they a "substantial" interference with plaintiffs' property rights. We find that this temporary denial of possession is not an appropriation. No "servitude" of any kind was acquired.

Plaintiffs state that they rely principally on our decisions in *Turney* v. *United States*, 126 Ct. Cl. 202, 115 F. Supp. 457 (1953); *Seery* v. *United States*, 130 Ct. Cl. 481, 127 F. Supp. 601 (1955); and *Miller* v. *United States*, 135 Ct. Cl. 1, 140 F. Supp. 789 (1956). Those decisions do not support plaintiffs' claim because the seizures and appropriations therein involved were clearly not temporary, and there were never any offers or attempts to return the appropriated property.

In *Turney* v. *United States*, *supra*, plaintiff unknowingly purchased radar equipment (classified material) from the Philippine Government as part of a surplus material lot of merchandise which the United States had previously given to the Philippine Government. Neither party knew that the radar equipment was classified. The United States later repossessed the radar equipment. Plaintiff was permanently deprived of his ownership. No offer to retain the property for future disposition was made. The government simply confiscated the property, and we awarded compensation.

In contrast, plaintiffs' vehicles were subject to their control and were always available limited only by a restriction which involved non-violation of Brazilian law. Only after the local court, in 1967, ordered the property given to da Silva (after da Silva had paid the requisite customs duties) did plaintiffs' ownership and control terminate.

In *Seery* v. *United States*, *supra*, the United States Army appropriated the home of a naturalized Austrian citizen for its use as an Officer's Club in Austria. Plaintiff was deprived of her use, possession, control and right to dispose of her property, for an indefinite period. We found a "taking" and

gave compensation. Plaintiffs, in our case, have not shown a comparable appropriation.

In *Miller* v. *United States*, *supra*, the United States impounded airplanes which, it alleged, plaintiff had contracted to sell in violation of foreign policy. Plaintiff repeatedly assured the government that any sale would be in accordance with national policy, but the government refused to return the airplanes. Defendant repossessed the planes, and then sold them to another purchaser. We found a compensable taking had occurred.

In our case, plaintiffs refused to agree to dispose of the property in conformity with treaty agreements and Brazilian law. The exercise of dominion and control by delivering the vehicles to Brazilian officials (which plaintiffs allege evidences a "taking"), was an action taken by the USAID in direct response to a request from Recife officials, pursuant to the decision of the lower court in awarding da Silva ownership and after plaintiffs had refused to act. The vehicles were given to the customs officials to permit them to collect the customs duties. These duties were then payable, and plaintiffs' rights of ownership were ended by the decision of the local Brazilian court. This was not a "taking" by the United States.

The only other relevant exercise of control by the USAID was to make the vehicles "available" to the Recife customs after the Embassy had decided not to request a duty-free sale. This merely notified the customs officials that duties would be payable if plaintiffs chose to dispose of automobiles by a sale in Brazil. This "notification procedure" was not a "taking".

These decisions give no comfort to plaintiffs' claim. Plaintiffs' insistence on an absolute right to dispose of their property duty-free is incorrect. The limitations imposed were in accordance with treaty agreements, and no action by the USAID or the Embassy establishes, or even indicates, an appropriation to a public use compensable under the Fifth Amendment.

In accordance with the foregoing, defendant's motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied. The petition is, therefore, dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CLARK E. FINKS AND FRANCIS A. WILLETTE, JR.,
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THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 514

CLARK E. FINKS AND FRANCIS A. WILLETTE, JR.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

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Petitioners' claim for just compensation is based upon the impounding of their automobiles by the United States Agency for International Development (USAID) in Brazil in order to prevent the sale of those automobiles in violation of treaty agreements, Brazilian customs laws, and Embassy regulations. The facts are set out in full in the opinion of the Court of Claims (Pet. 9–19). In October and November 1963, each of the petitioners, who were then USAID employees, took delivery of a new American automobile in Brazil without payment of that country's substantial import duty, under a diplomatic agreement

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which provided for the waiver of the duties for certain diplomatic personnel and which specified the circumstances in which such automobiles may be resold duty-free in Brazil upon prior request of the American Embassy and approval by the Brazilian Ministry of Foreign Affairs. In August 1964, petitioners became involved in litigation with a Brazilian car dealer who had loaned them money to purchase the automobiles and who claimed ownership of the cars. Thereafter, despite the fact that the automobiles were not eligible for duty-free resale and the Embassy's advice that it would not approve any request to Brazilian authorities for such resale, petitioners openly sought to sell the automobiles without payment of the duty. In October 1964, USAID officials impounded the automobiles, and petitioners were advised that the cars would be released to them if they agreed that they would not attempt to sell them in violation of Brazilian law.[1] Petitioners, who were obviously motivated by the difference between the $3,500 purchase price of the automobiles and their $12,000 market value in Brazil, refused to give such assurances. USAID retained custody of the automobiles after petitioners resigned their positions and returned to the United States, and the automobiles were ultimately turned over to the Brazilian car dealer, who prevailed in his civil suit against petitioners and who paid the import duties.

[1] The American Ambassador also advised petitioners that he would arrange to have the automobiles returned to the United States at government expense if they so desired.

The Court of Claims correctly held that the impounding of petitioners' automobiles in the circumstances of this case was not a compensable taking under the Fifth Amendment. See *United States* v. *Dickinson*, 331 U.S. 745; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155. At all relevant times, the automobiles remained subject to petitioners' disposition—for their own personal use or for sale in accordance with Brazilian law and the treaty agreements. The only interest of which petitioners were deprived was the opportunity to sell the vehicles unlawfully. Compare *General Motors Acceptance Corp.* v. *United States*, 286 U.S. 49.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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